Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1940

U. S. CABLEVISION CORP.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 10, 1980

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner U.S. Cablevision Corp. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 23, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The decision below of the National Labor Relations Board in this matter is reported at 240 NLRB 123 (1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 23, 1980. A

timely petition for rehearing *en banc* was denied on April 8, 1980 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Should the National Labor Relations Act countenance the forced designation of an employee as an election observer against that individual's wishes and without his consent?

2. In a case involving an election decided by a single vote, did the Court of Appeals err in concluding that as a matter of law there were no issues surrounding the designation of an unwilling employee as an election observer which required either the setting aside of the election or an evidentiary hearing into the impact of such conduct on the representation election?

STATUTE AND RULES INVOLVED

This case involves Section 7 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 157 and Sections 102.69(a) and (f) of the rules and regulations of the National Labor Relations Board, 29 C.F.R. §§ 102.69(a) and (f), the texts of which are set forth in pertinent part in Appendix B.

STATEMENT OF THE CASE

Local 320, International Brotherhood of Electrical Workers ("Union") filed a representation petition with the National Labor Relations Board ("Board") seeking certification as the collective bargaining representative of a unit composed of all full-time and regular part-time construction and maintenance employees at the Beacon, New York and Monroe, New York facilities of U.S. Cablevision Corp. ("Company"). Pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on February 9, 1978. The election results showed 11 votes cast

for the Union and 10 against the Union, with one void ballot (A. 69).[1]

Shortly before the election, Tracy Dunay, Joseph Malouf and Gary Rose, three employees of the Company who were eligible voters in the underlying representation election, received certain documents in the mail from the Union. One of the documents was a copy of a letter from a Board Agent of Region Two, addressed to both the Union and the Company, asking each to designate its observers on a Region Two form and return the form to the Board. A second document was a copy of a letter from the Union to the Board which named Dunay, Rose and Malouf as election observers for the Union. The other was a copy of the Board's official instructions to election observers, which informed each employee that by virtue of his observer status, he was now an "official representative" of the Union (A. 11, 64-66). As a result of these communications, each of the three employees was made aware not only of his own designation as an observer, but also of the status of the other two employees as well.

Gary Rose first learned of his selection by the Union upon receipt of the letter. Prior to that, he had at no time discussed the possibility of his being an observer with anyone representing the Union. The documents he had received led Rose to believe that the Company had also been sent a copy of the observer designation form made out by the Union. As a result, Rose felt coerced by being forced either to have to tell his employer that he had not given the Union permission to use his name and that he was not supportive of the Union effort, or to say nothing and allow the Company to conclude from his silence that he was in favor of the Union becoming the bargaining agent for the group. Inasmuch as it upset him to realize that his Union observer status made it appear that he was in favor of the Union, a position contrary to both the statements he had made all along in discussing

[1] "A." refers to page 69 of the printed Appendix in the Court of Appeals.

the matter with certain employees he knew well and to the uncommitted approach he had taken when questioned by others, Rose informed his supervisors that he had never agreed to be an observer for the Union.

Dunay, who had been named the Union's Chief Observer, communicated to at least five additional unit employees that Rose would be the alternate Chief Observer for the Union at the election. Thus, the effect of Rose's appointment and the statement to employees which followed was to reverse his anti-Union or neutral image in the eyes of at least seven of his fellow employees, and possibly more, in the small unit of twenty-two eligible voters at a time just prior to the election. Many of Rose's friends, including those who regarded him as previously uncommitted, must have believed that he had openly announced his support for the Union. Rose believed all along that he would be required to serve as an observer for the Union and he appeared at the polls on the day of the election, as instructed, a half hour before the time they were scheduled to open. Thus, notwithstanding a last minute agreement which limited each party to a single observer, Rose's conduct on election day did not alter what his fellow employees perceived as his support for the Union.

The Company filed timely objections to conduct affecting the results of the election, alleging that the Union had interfered with the employees' freedom of choice by designating as an election observer, on a form provided by the Board, an employee who had not authorized the Union to name him as an observer for that side. In support of its position, the Company provided the Regional Director with the aforementioned detailed allegations of interference with the laboratory conditions of the election, including the names of five unit employees with whom Dunay had discussed Rose's observer status. This evidence presented substantial and material factual issues which would have benefitted from further development and cross-examination at a hearing.

Relying upon the wording of Section 102.69(a) of the Board's Rules and Regulations, 29 C.F.R. § 102.69(a), which states in part that any party may be represented by observers of its own selection, the Board's Regional Director determined that a party may force an employee to act as an election observer without his or her consent. This holding of the Regional Director is erroneous as a matter of law.

The Regional Director committed other errors of law, including her conclusion that, even assuming that Rose's involuntary designation did in fact interfere with the ballots of one or more employees, that did not warrant the close election being set aside because Dunay was not an agent of the Union in communicating Rose's status to others. After refusing to hold a hearing, the Regional Director issued her report in which she recommended that the Company's Objections be overruled in their entirety (A. 69-70, 9, 16).

The Company filed timely Exceptions to the Regional Director's report, along with a supporting brief, in which the Company reiterated its Objections, specified numerous factual and legal errors in the Regional Director's report and renewed its demand for a hearing (A. 70, 18-22). The Board adopted the Regional Director's findings and recommendations in their entirety and certified the Union (A. 23). The Union thereupon requested that bargaining commence. The Company refused that request in order to test the validity of the certification. The Union filed unfair labor practice charges with the Board, alleging that the Company had violated Sections 8(a)(5) and 8(a)(1) of the Act, 29 U.S.C. §§ 158(a)(5) and 158(a)(1) by its refusal to bargain with the Union. The Company denied that its refusal was a violation of the Act and further denied that the Union was the bargaining representative of its employees (A. 70, 67-68).

The Board granted the motion for summary judgment which had been filed by the General Counsel and held that the Company's refusal to bargain violated the Act. It found that all issues raised by the Company were, or could have been, litigated in the prior representation proceeding, and

that the Company had therefore raised no issue which was properly litigable in the unfair labor practice proceeding (A. 70-71). The Company filed a motion for reconsideration (A. 79-80) which was denied by the Board (A. 83-84).

The Board petitioned the United States Court of Appeals for the Second Circuit for enforcement of its Decision and Order pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e). The Court of Appeals held that, although it did not condone the practice of designating an employee as an election observer without his or her consent, such conduct did not raise any issues which would require either a hearing or the setting aside of the election. As a result, the Court granted enforcement of the Board's Decision and Order.

The Company petitioned the Court of Appeals for rehearing *en banc*, but the petition was denied. The Court did, however, stay its mandate pending the filing of this petition for certiorari with this Court.

In conclusion, the Company respectfully requests that this Court recognize the manifest injustices created by the Board's Decision and Order in this case and deny its enforcement.

REASONS FOR GRANTING THE WRIT

A. The Board's Interpretation of Its Own Regulations Regarding the Appointment of Observers Raises Significant and Potentially Recurring Problems under the National Labor Relations Act.

The Board grounded its holding in this case upon its assertion that, "The designation by a party of specific individuals to serve as election observers need not be conditioned upon the consent . . . of the affected individuals" (A. 13). Rose was designated as a Union observer without his knowledge or consent. There was nothing on the Region Two form (A. 64, 66) which indicated to him that he had any right to decline the position. This decision thus grants virtual carte blanche to both employers and unions to arbitrarily designate bargaining unit employees as observers

without their consent. The inescapable result would be that employees who had not declared themselves—or even worse, those who had—and those whose views may be important to other employees, are suddenly portrayed at the time of the election to be supporting that side which has designated them as observers without their consent.

It is well established that employee votes are often influenced by the feelings and declarations of their fellow workers.[2] To permit one party to designate an employee as an observer without that employee's consent opens the floodgates for improper manipulation of other employees and abuse of the Board's election mechanism.

While the Court of Appeals stated in its opinion that it did "not condone" the practice of designating an employee as an election observer without his or her consent, the Court did in fact enforce a Decision and Order of the Board which was grounded firmly on the "right" of unions and employers to engage in precisely that kind of coercion and interference. It is particularly important for this Court to grant certiorari and resolve this question of first impression before such a reprehensible practice becomes widespread. Such conduct is in clear conflict with the core of the Section 7 of the Act, 29 U.S.C. § 157, which grants employees the right to engage, or to refrain from engaging, in union activities. Untold

[2]The Board has repeatedly recognized this voter perception with regard to observers, holding that "the identity of election observers, as well as the fact that they represent the special interest of the parties is generally well known to the employees". *See, e.g., Larkwood Farms, Division of the Pillsbury Co.*, 178 NLRB 225 (1969); *Firestone Tire and Rubber Co.*, 120 NLRB 1644 (1958). Misrepresentations to some employees regarding the degree of support for a Union by their fellow employees have been held so substantial as to invalidate the use of Union authorization cards as a reliable indicator of uncoerced employee sentiment and Union majority support. See *NLRB v. Rooney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979), and cases cited therein; *Schwarzenback-Huber Co. v. NLRB* 408 F.2d 236, 241 (2d Cir. 1969), *cert. denied*, 396 U.S. 960 (1969). The analysis applied to the validity of authorization cards applies with even greater vigor to representation elections where ballots are valid only if cast under "laboratory conditions".

numbers of other "sophisticated" unions and employers may, in light of this decision, designate popular and respected unit employees as election observers without their consent in the hope of holding out such individuals to other unit employees as supportive of their side in the representation campaigns. It is only by the granting of the petition for certiorari that this germ of a concept can be halted at this juncture, before its use in other cases becomes epidemic.

B. The Failure to Afford the Company a Hearing at Any Stage of the Proceeding Violates Due Process of Law and Conflicts with Other Courts of Appeals Decisions.

In its opinion in this case, the Court of Appeals utilized an erroneous legal standard in determining the Company's right to a hearing. While the Court recognized that the test for ascertaining whether a party is entitled to a hearing on its objections to a representation election is whether that party produced ***prima facie*** evidence of the existence of substantial and material factual issues, the Court converted that standard into a test which required the Company to establish as a matter of law the invalidity of the election itself. The Court held herein that,

> "While we do not condone the practice of designating an employee as an election observer without his or her consent, this is not the type of practice that ***automatically*** impairs the validity of an election. . . . In short, we cannot say that there are ***any issues*** surrounding the designation of the unwilling employee as an observer ***that would require the setting aside of the representation election*** . . . if resolved in Cablevision's favor."

Slip opinion at 3 (emphasis added).

To place this high evidentiary hurdle before the Company prior to its being able to obtain a hearing is at odds with the long-standing line of decisions from several courts of appeals which have adopted the ***prima facie*** evidence test and have recognized that the need for a hearing is "particularly acute" in situations, such as the case at bar, where an election is close. (The vote was 11 to 10 with one void ballot.)

In such circumstances, it simply cannot be said as a matter of law that even minor misconduct did not interfere with the election. *NLRB* v. *Skelly Oil Co.*, 473 F.2d 1079 (8th Cir. 1973); *NLRB* v. *Gooch Packing Co.*, 457 F.2d 361 (5th Cir. 1971). *See also NLRB* v. *Hale Mfg. Co.*, 602 F.2d 244, 248 (2d Cir. 1979); *NLRB* v. *Bristol Spring Mfg. Co.*, 579 F.2d 704, 707 (2d Cir. 1978); *Henderson Trumbull Supply Corp.* v. *NLRB*, 501 F.2d 1244 (2d Cir. 1974). It has recently been held that a hearing by the Board is unnecessary only where "the board accepts the factual allegations of the Company, and *no additional facts remain to be developed. . . .*" *NLRB* v. *Hale Mfg. Co., supra*, 602 F.2d at 248 (emphasis in original). Hearings have previously been ordered by the courts of appeals whenever such hearings "would have afforded the Company the opportunity to develop the facts and to obtain witnesses who could establish the effect of the incident on the attitudes of the unit employees. . . ." *Id.* at 249. It is clear that the Company's initial presentation of facts to the Board in this case demanded the development of additional facts.

The first set of facts which were in conflict and needed development pertained to the status of the Union's Chief Observer as an agent of the Union. The Regional Director concluded that the Union was not responsible for the publication of Rose's selection as a Union observer because "no evidence was adduced in the investigation to indicate that he (Dunay) was authorized to act as an agent for the Petitioner for this purpose" (A. 14 n.9). The Regional Director utilized much too narrow a view of the agency doctrine and failed to examine other theories for agency status besides express authorization. Dunay was the individual who was designated at the Union's Chief Observer, and further investigation might have shown him to have been active in and an integral part of the Union's campaign efforts. As noted earlier, the Board has held the designation of an employee as an observer to be strong evidence of that employee's support for the Union. Other employees, therefore, may have identified Dunay as the in-plant voice of the Union, and may have believed that further campaign efforts by Dunay on behalf of

the Union, such as informing them of the names of all three Union observers, had been authorized by the Union. Moreover, inasmuch as Dunay's conduct was the natural and probable consequence of the Union's action in designating Rose as an observer and in telling Dunay of this fact, the Union should have been estopped from denying responsibility for Dunay's actions.

It is submitted that, in these circumstances, further investigation and a hearing were required before the determination concerning Dunay's agency status could have been properly made by the Regional Director. The Second Circuit's affirmance of the Board on this matter is in conflict with a similar case from the Eighth Circuit Court of Appeals. In *NLRB v. Skelly Oil Co., supra*, the Court held in the context of employer objections to an election based on alleged misrepresentations that the Union election observer's status as Agent constituted an important but disputed factual issue which required further investigation and hearing.

The Second Circuit decision below also conflicts with the holding in *NLRB v. Smith Industries, Inc.*, 403 F.2d 889 (5th Cir. 1968). In that case, the Court held that the standard for determining the right to a hearing on objections to a representation election was the same test which is employed by courts in deciding whether a grant of summary judgment is proper.

> " '[S]ummary judgment can be granted only when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." ' . . .
>
> 'It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment.' " *Id.* at 893.

Evaluating the evidence in that case, the Fifth Circuit concluded that the employer was entitled to a hearing regarding

its claim of an agency relationship between the union and its chief in-plant organizer.

There were also substantial and material factual issues involved in the impact upon the unit employees of the involuntary appointment of Rose as a Union election observer. Determination of those issues also called for a hearing. The Company submitted to the Regional Director detailed information regarding the names of employees who were made aware of Rose's designation, and the names of employees to whom Rose attempted to refute his newly acquired pro-Union image. There was no evidence which indicated that Rose, or others, had discussed his true feelings about the Union with those voters who were told of Rose's observer status by Dunay, an alleged Union agent. Thus, investigation into each employee's subjective feelings as well as into objective evidence was required in order to ascertain the veracity of the claims of election interference.

The Eighth Circuit Court of Appeals has held that the failure to hold a hearing, with the opportunity to observe and examine the witnesses directly, to probe into all of the surrounding circumstances, and to view the facts cumulatively may lead to "erroneous legal conclusions." *NLRB v. Skelly Oil Co., supra,* 473 F.2d at 1084, n.14. Moreover, without such a hearing, the Company was powerless to inquire further into these or other employees' subjective states of mind since such a gathering of evidence would have violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). *Johnnie's Poultry Company,* 146 NLRB 770, 774 (1964). In short, there were disputed substantial and material factual issues which required that the Company be granted a hearing at some stage of the proceeding.[3]

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[3] The Board's reliance upon this Court's decision in *Pittsburgh Plate Glass v. NLRB,* 313 U.S. 146, 162 (1941), in support of its grant of summary judgment (A. 71 at n.3) is also misplaced. In *Pittsburgh Plate Glass* the Board did conduct a full hearing, including presentation of witnesses and cross-examination during the representation case. The sole issue decided by this Court was whether a second hearing was required in the subsequent unfair labor practice case.

The failure of the Board and of the Court of Appeals to order such a hearing deprived the Company of due process of law. Moreover, the test adopted by the Board and the Court in reviewing alleged agency status was also eroneous. These holdings of the Second Circuit are in direct conflict with decisions rendered by the other courts of appeals.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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June 10, 1980

The Court held that it was not. In this case, however, the Board did not grant the Company a hearing at any step of the representation case concerning the resolution of disputed materal factual issues. Under such circumstances, the rule against relitigation cannot act to deprive the Company of its "day in court". The board's grant of summary judgment in the unfair labor practice proceeding prior to the resolution of key factual issues was improper and must be overturned. This is particularly true where the Company's objections were ruled upon internally by the Regional Director whose own actions were the root cause of the conduct complained of herein.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 553 SEPTEMBER TERM, 1979
ARGUED DECEMBER 14, 1979 DECIDED JANUARY 23, 1980
Docket No. 79-4148

NATIONAL LABOR RELATIONS BOARD,
Petitioner

–v–

U. S. CABLEVISION CORP.,
Respondent.

Before MULLIGAN, OAKES, and GURFEIN,* *Circuit Judges.*
Petition by the National Labor Relations Board for enforcement of an order holding respondent in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1) for refusal to bargain with the certified collective bargaining representative of respondent's employees.

Enforcement granted.

MARJORIE GOFREED, National Labor Relations Board, Washington, D. C. (Norton J. Come, Acting General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and Ruth E. Peters, National Labor Relations Board, Washington, D. C., of counsel), for *Petitioner.*

ROBERT P. WEINTRAUB, Boston, Mass., CHARLES W. SULLIVAN, New York, N. Y. (Deutsch, Weintraub & Glazerman, P. C. and Ira F. Jaffe, Boston, Mass. and Edwards & Angell, New York, N. Y., of counsel), for *Respondent.*

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* Judge Gurfein participated in the oral argument in this case and voted before his death on December 16, 1979 to dispose of the case in the manner set forth in this opinion. He was unable to concur in the opinion itself because it was drafted after his death.

PER CURIAM:

The National Labor Relations Board (NLRB) has petitioned for enforcement or an order determining that respondent U.S. Cablevision Corporation has refused to bargain with the certified collective bargaining representative of its employees in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). Cablevision acknowledges that it has refused to bargain with the certified representative, the International Brotherhood of Electrical Workers (IBEW), Local 320, but contends that the union was improperly certified because of tainted election procedures.

More specifically, Cablevision argues that the election should be set aside because the union designated as an official observer an employee who had not consented to be an observer for the union and who in fact was opposed to the union. Cablevision contends that this designation of the employee may have influenced other employees to support the union and may have swayed the election, which the union won by only one vote. At minimum, Cablevision requests that the Board be required to permit Cablevision to present its evidence at a hearing.

This Court has said:

> The conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse.

NLRB v. *Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970) *cert. denied*, 401 U.S. 954 (1971) (emphasis in original). Nonetheless, this court has also stated:

> [D]espite this broad definition, a party is entitled to a hearing if it demonstrates by *prima facie* evidence the existence of " 'substantial and material factual issues' which, if resolved in its favor, would require the setting aside of the representation election."

NLRB v. *Manufacturing Co.*, 602 F.2d 244, 248 (2d Cir. 1979), *printed at* 604 F.2d Appendix following 671 (emphasis in original).

In our view, the Board's order, even with no prior hearing, is valid and should be enforced. While we do not condone the practice of designating an employee as an election observer without his or her consent, this is not the type of practice that automatically impairs the validity of an election. The designated employee made an ample effort to counteract any inference that his designation demonstrated his support for the union. In short, we cannot say that there are no issues surrounding the designation of the unwilling employee as an observer "that would require the setting aside of the representation election," *Hale Manufacturing, supra*, if resolved in Cablevision's favor. Accordingly, the election will not be set aside and no hearing is required.

Enforcement granted.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

A. DANIEL FUSARO
CLERK

N.L.R.B. v. U.S. Cablevision Corp. September Term, 1979
Docket No. 79-4148 Decided January 23, 1980

Page 1020, line 12—delete "are no issues" and insert "are any issues" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hjd

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and eighty.

Docket No. 79-4148

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

U.S. CABLEVISION CORP.,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Due to his untimely death on December 16, 1979, Judge Gurfein, a member of the panel, did not participate in the consideration of this petition.

IRVING R. KAUFMAN
Chief Judge

IRVING R. KAUFMAN

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. MULLIGAN,
HON. JAMES L. OAKES,
Circuit Judges.

Docket No. 79-4148

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

U.S. CABLEVISION CORP.,
Respondent.

A petition for a rehearing having been filed herein by counsel for the respondent,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
A. DANIEL FUSARO,
Clerk

APPENDIX B

Statute and Rules Involved

29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join or assist labor organizations, . . . and shall also have the right to refrain from any or all such activities . . . .

29 C.F.R. § 102.69(a)

. . . Any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe . . . .

29 C.F.R. § 102.69(f)

(f) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer.